IN THE

Supreme Court of the United States

October Term, 1965
No. 881.

BOYS TOWN, USA., INC.,

Petitioner,

vs.

THE WORLD CHURCH; JACKSON APPLIANCE, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent Jackson Appliance, Inc. in Opposition.

Statement.

This action rests solely on diversity of citizenship; no federal subject matter jurisdiction exists or is alleged. The dispute arises from an alleged agreement whereby Respondent The World Church ("Church") was to convey real property located in Ventura County, California to Petitioner Boys Town, U.S.A., Inc. Petitioner, which is not related in any way to the famous Boys Town, initiated the controversy by filing an action in a California state court seeking specific performance or damages for breach of contract. Respondent Jackson Appliance, Inc. ("Jackson") intervened in the action as a subsequent grantee of the real

property from the Church. Judgment on the merits was entered against Petitioner on the grounds that the contract lacked mutuality of remedy. The court also noted that petitioner had failed to prosecute its action diligently. This judgment was affirmed on appeal, and the California Supreme Court declined to hear the matter. Petitioner then brought this action in the United States District Court for the Southern District of California seeking the same relief against the Church and Jackson and adding a claim against the latter for tortious interference with the contractual relations between Petitioner and the Church. On Jackson's motion, summary judgment was entered against Petitioner and in favor of both Respondents. The Ninth Circuit affirmed.

Argument.

In an attempt to continue this seemingly interminable litigation, Petitioner has attempted to frame two issues on which to base its petition for writ of certiorari:

(1) whether a subsequent grantee of real property can assert the defenses of *res judicata* and the Statute of Limitations against a prior claimant, for his own benefit as well as that of the grantor, and

(2) whether Jackson's intervention in the state court proceedings tolled California's two year Statute of Limitations (California Code of Civil Procedure § 339) for interference with contractual relations.

Respondent submits that these are utterly frivolous issues which Petitioner has used to attempt to perpetuate a cloud on the title of the subject real property.

As for the first issue, the trial court granted summary judgment on the grounds that the action against the Respondents was barred by *res judicata* and the Statute of Limitations. Petitioner claims that these two defenses could not be raised by Jackson either for its own benefit or for that of the Church. No substantial question of federal law is raised by such a claim; nor does Petitioner cite any federal decision with which the trial court's judgment is in conflict. Jackson intervened in the state court proceeding as a party defendant. Whether it can rely on the judgment in that action as *res judicata* of the claim now asserted against it in this action is purely a question of California law. Similarly, it is California law which governs the question whether a grantee of property may raise for his own benefit the defense that the claimant would have been barred by the Statute of Limitations had he proceeded against the grantor alone. See *Johnson v. Ware*, 58 Cal. App. 2d 204, 136 P. 2d 101 (1943) (widow of deceased tenant-in-common may raise the Statute as a defense to a claim by the other tenant that the property had actually been held in joint tenancy).

Nor does the trial court's entry of judgment in favor of the Church conflict with *Fed. R. Civ. P.* 8(c). Nothing in that rule prohibits a court from entering judgment for a defendant when a co-defendant has successfully litigated issues which are common between them. Petitioner's citation of *Donovan v. Dallas*, 377 U.S. 408 (1964) is inapposite. That case merely held that a state court could not enjoin federal proceedings initiated by a plaintiff who had unsuccessfully litigated the same claim in the state court. The proper procedure, this Court said, was for the defendants to raise the defense of *res judicata* in the federal action.

As for the second issue, raised for the first time in oral argument before the Ninth Circuit, Respondent respectfully submits that it is solely a question of California law whether its intervention in the state court proceeding tolled the two year Statute of Limitations for the purposes of the present action. Even if this argument had been presented to the trial court, Petitioner has not explained how it would have created any issue of fact which would have warranted the denial of summary judgment.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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